June 10

No. 76-1596

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, petitioner

-V-

JOHN MAURO and JOHN FUSCO, respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT, JOHN FUSCO IN OPPOSITION

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The basic question raised by the petition for writ of certiorari is whether the government by issuing a writ of habeas corpus ad prosequendum may ignore and bypass the provisions of the Interstate Agreement on Detainers Act, Sections 1-8, 84 stat. 1397-1403, 18 U.S.C. App., pages 4475-4478.

The Interstate Agreement on Detainers Act ("Agreement") was passed by act of Congress on December 9, 1970 and the United States thereby joined the Agreement. Although, no statute was passed abolishing the writ of habeas corpus ad prosequendum because of the fact that the states of Alabama, Alaska, Mississippi and Oklahoma have never adopted the Agreement. In order for the government to obtain a prisoner from one of their institutions for trial, the use of such a writ would be mandatory. As these states are not part of the Agreement

the writ would be the only means by which the government could obtain one of their prisoners for trial. However, the writ was not left on the statute books to provide the government with a back door to use to avoid its obligations as an adopting state under the Agreement.

The purpose of the Agreement, which was adopted in its entirety by the United States without modifications is set forth in Article 1 as follows:

> The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

When the United States adopted this Agreement without modification, Article 1 became a legislative statement of the agreement of the government as to the obtaining of prisoners from state jurisdictions. In reading the text of the Agreement itself to determine the intent of Congress, nowhere does the Agreement state that the United States does not have to follow it if the prosecutor finds it is inconvenient or desires to avoid its terms. Where the government does not follow the procedure set forth in the Agreement and proceeds to obtain the prisoner in question by a writ of habeas corpus ad prosequendum it is never-

theless bound by the terms of the Agreement.

While the government petition states that the uniform practice of federal prosecutors, before and after enactment of the Agreement by Congress in 1970, has been to apply to the District Courts for writ of habeas corpus ad prosequendum, all the petitioner is stating is that the government has habitually ignored the provisions of the Agreement which is as binding on the government as it is on the states. The problem is one which can be solved by the Department of Justice instructing its various prosecutors that the Agreement is the law for the obtaining of prisoners from the states and that the writ of habeas corpus ad prosequendum should only be used to obtain prisoners from those states who are not part of the agreement.

The complaint of the government set forth in the petition for writ of certiorari states that the government has now been faced with numerous proceedings by prisoners to dismiss their federal indictments because of the violation of the terms of the Agreement by the federal prosecutors. Certainly if the federal prosecutors have been habitually violating the terms of the Agreement then the prisoners bringing on such proceedings are certainly justified and the indictments should be dismissed. The remedy for the government to avoid these questions when state prisoners taken into government custody and then returned without trial, is to instruct federal prosecutors to follow the terms of the Agreement to the letter. In this way no prisoners would have ground for bringing on proceedings to dismiss their indictments.

It is therefore respectfully submitted that a petition for writ of certiorari should be denied.

JUNE, 1977 -3-

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